

SHAARI SAHAT & ORS

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v.

TSURITANI (MALAYSIA) SDN BHD (MELAKA)

HIGH COURT MALAYA, MELAKA

b

LOW HOP BING J

[NO: 24-49-2001]

3 DECEMBER 2001

CIVIL PROCEDURE: Time - Extension of time - Application to file Form 111B out of time - Whether respondent prejudiced - Whether respondent waived the irregularity - Jurisdiction, power and discretion of court to extend time - Rules of the High Court 1980, O. 3 r. 5, O. 92 r. 4 - Courts of Judicature Act 1964, Schedule, para 8

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CIVIL PROCEDURE: Affidavits - Need to reply specifically to allegations - Applicant's affidavit in support not replied or contradicted by respondent - Whether an admission of facts asserted in applicant's affidavit in support of application

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This was an application under O. 3 r. 5 Rules of the High Court 1980 ('RHC') for leave to file a Form 111B out of time. The applicant also prayed for an order that his notice in Form 111B filed earlier on 12 March 2001 be deemed to have been regularly filed under O. 53 r. 4(1) RHC. It was contended that the applicant's four-day delay was unintentional and a mere irregularity which did not prejudice the respondent. The respondent objected to the application arguing that, unlike O. 53 r. 3(6) RHC, O. 53 r. 4(1) RHC does not empower the court to extend time.

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Held:

- [1] The respondent's failure to reply to and contradict the applicant's affidavit in support of the application must be treated as an admission of the facts asserted therein, ie, that the applicant's four-day delay was unintentional and a mere irregularity which did not prejudice the respondent. (p 55 c)
- [2] The High Court has a wide discretion to grant an extension of time under O. 3 r. 5 RHC. That discretion may also be exercised under its inherent jurisdiction pursuant to O. 92 r. 4 RHC as well under para 8 of the Schedule to the Courts of Judicature Act 1964. On the facts, the applicant's fleeting four-day delay did not prejudice the respondent at all. Moreover, the respondent had waived the irregularity by filing an affidavit in response to the applicant's notice in Form 111B. (pp 55 d-g & 56 e-f)

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[Application allowed.]

a Case(s) referred to:

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 (foll)

Legislation referred to:

Rules of the High Court 1980, O. 3 r. 5(1), (2), O. 53 rr. 3(2), (6), 4(1), (2), O. 92 r. 4

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For the applicants - Ravinathan Muthiah; M/s Ravi Muthiah & Co

For the respondent - Sekar Palaniandy; M/s Sault & Co

Reported by Gan Peng Chiang

JUDGMENT

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Low Hop Bing J:

Application

d This is the applicants' application in encl. (9) under O. 3 r. 5 of the Rules of the High Court 1980 for leave to file Form 111B out of time and that Form 111B which has been filed as encl. (5) herein on 12 March 2001 be deemed to have been validly and regularly filed under O. 53 r. 4(1).

Affidavit In Support

e The applicants' affidavit in support avers that under O. 53 r. 4(1) a draft copy of Form 111B was filed on 23 February 2001 pursuant to leave of the court granted *ex parte* on 22 February 2001, while a fair copy thereof was filed on 12 March 2001, which was therefore four days beyond the 14-day time frame prescribed under O. 53 r. 4(1). It was averred in the said affidavit that the delay of four days occasioned by the applicants was unintentional and does not prejudice the respondent. There was no reply by the respondent to this affidavit.

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Submission For Applicants

g En. Ravinathan Muthiah, learned counsel for the applicants, in his submission substantially followed what has been averred in the affidavit and added that the delay of four days was a mere irregularity which the respondent has waived when the respondent filed an affidavit dated 27 July 2001 in response to the service of Form 111B on the respondent.

Objection By Respondent

h In resisting the aforesaid application, Encik Sekar Palaniandy, learned counsel for the respondent, contended that O. 53 r. 4(1) does not require a draft copy of Form 111B to be filed and therefore the filing of the said draft copy constituted an error on the part of the solicitors. That being the case, he said that this ground could not be accepted.

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He added that under O. 53 r. 4(1), the court does not have the jurisdiction to extend the time, unlike O. 53 r. 3(6) which empowers the court to extend the period of 40 days thereunder if there is good reason for doing so. a

Decision Of The Court

At the outset, it must be immediately emphasised that there was no reply to the allegation of facts contained in the applicants' affidavit in support. Therefore in evaluating the applicants' allegation of facts, where the applicants make a positive assertion upon a material issue on the unintentional delay and that the delay was not prejudicial to the respondent; the failure of the respondent to contradict it is to be treated as an admission by the respondent of the facts so asserted: *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA. That being the case, I accept the applicants' explanation that the four day delay was unintentional and does not prejudice the respondent. b
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The power of this court to grant an extension of time is provided in O. 3 r. 5(1) and (2) of the Rules of the High Court 1980 in the following words: d

5. Extension, etc of time (O. 3 r. 5)

- (1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings. e
- (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

This power is to be exercised by way of a discretion ie, a judicial discretion which must be exercised according to established judicial principles. Further, the court may in any case exercise its inherent jurisdiction under O. 92 r. 4 to make any order as may be necessary to prevent injustice. Para. 8 of the Schedule to the Courts of Judicature Act 1964 also confers upon the court additional powers eg, to enlarge the time prescribed by any written law, which of course includes the Rules of the High Court 1980, for doing any act or taking any proceeding. Contrary to the respondent's contention that the court is not empowered to grant an extension of time, the aforesaid statutory provisions confer all the powers on the court in so far as extension or enlargement of time is concerned. f
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The plaintiffs' application under consideration pertains to an application for judicial review under O. 53 which was amended *vide* P.U.(A) 342/2000 which came into force on 22 September 2000 ie, about 4 1/2 months before the applicants' application for leave was filed on 8 February 2001. After leave has been granted under O. 53 r. 3, as amended, the applicant has to comply with O. 53 r. 4 which reads as follows: h
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- a* 4 (1) Where leave has been granted under this rule, the applicant shall, within 14 days after the grant of such leave, file a notice in Form 111B.
- (2) Upon extraction of the sealed copy of Form 111B the applicant shall serve a copy of the same together with a copy of the statement and all affidavits in support on all persons directly affected by the application
- b* not later than 14 days before the date of hearing specified in the said Form.

c What is envisaged in O. 53 r. 4(1) is that after obtaining leave thereunder, the applicant is required to file a notice in Form 111B within 14 days of the grant of such leave. There is no necessity to file a draft copy of Form 111B, as has been done by the applicants herein. This is the root cause of the delay occasioned by the applicants.

d Be that as it may, the next mandatory procedural step to be taken by the applicants has been set out in O. 53 r. 4(2) ie, to obtain the extract copy of Form 111B and serve a copy of the same together with the statement (filed under O. 53 r. 3(2)) and all affidavits in support on all persons directly affected by the application not later than 14 days before the date of hearing specified in the said Form 111B.

e On the facts, I am unable to see any prejudice to the respondents as a result of the brief delay occasioned by the applicants. In fact, the content of the draft copy of Form 111B served on the respondent would be repeated in Form 111B to be served on the respondent if the applicants' application for extension herein is allowed. The fact that the respondent has filed an affidavit in response to the said Form 111B shows that the irregularity, if any, has been waived or

f excused by the respondent.

In the circumstances, justice of the case is served by exercising my discretion to extend the time sought herein. I therefore allow this application and make an order in terms thereon. Costs in the cause.

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